

REMARKS

These remarks are responsive to the Office Action mailed September 15, 2009 (“Office Action”). The Office Action has been received and carefully considered. Reconsideration of the current objections/rejections in the present application is also respectfully requested based on the following remarks. Claims 1-20 and 22-26 are currently pending in the present application. All of the claims stand rejected. The claims have been amended as indicated above. No new matter has been added. Reconsideration of the current rejections in the present application is respectfully requested based on the following remarks.¹

The Objection to the Prior Amendment Under 35 U.S.C. § 132(a) Is Improper

On page 10 of the Office Action, the amendment filed on June 18, 2009 is objected to under § 132(a) as allegedly introducing new matter to the disclosure. Specifically, the amendment to claim 8 is objected to (“which sealing zone extends circumferentially along the edge rim of the lever ring”). Applicants respectfully traverse.

First, the objection to claim 8 under § 132(a) is improper. This section does not apply to claim language, but applies to the specification. The Court of Customs and Patent Appeals (the fore-runner to the modern Federal Circuit) held that:

The proper basis for rejection of a claim amended to recite elements thought to be without support in the original disclosure, therefore, is §112, first paragraph, not §132. The latter section prohibits addition of new matter to the original disclosure. It is properly employed as a basis for objection to amendments to the abstract, specifications, or drawings attempting to add new disclosure to that originally presented. Past opinions of this court, in cases in which a §132 claim rejection

¹ As Applicants’ remarks with respect to the Examiner’s rejections are sufficient to overcome these rejections, Applicants’ silence as to assertions made by the Examiner in the Office Action or certain requirements that may be applicable to such rejections (e.g., assertions regarding dependent claims, whether a reference constitutes prior art, whether references are legally combinable for obviousness purposes) is not a concession by Applicants that such assertions are accurate or such requirements have been met, and Applicants reserve the right to analyze and dispute such in the future.

was reviewed on a §112 analysis, should not in future be viewed as having approved the employment of §132 as a basis for claim rejection.

In re Rasmussen, 211 USPQ 323, 326 (CCPA 1981).

Second, Applicants submit that the limitation is supported by the present disclosure. Applicants point out that a claim does not have to use the same language as in the specification. “While there is no *in haec verba* requirement, newly added claim limitations must be supported in the specification through express, implicit, or inherent disclosure.” MPEP § 2163(I)(B). The claim merely has to provide a skilled artisan with sufficient information to show that Applicants were in possession of the claimed invention as a whole when the application was filed. *See* MPEP § 2163(II)(A)(3). Applicants submit that the present application meets this standard. For example, Applicants submit that the limitation amended to claim 8 is at least inherently present in claim 1 as originally filed, which is part of the original disclosure, and in ¶¶ [0005] and [0008], for example, of the published application.

The Office Action on page 10 alleges that “[t]his new limitation in claim 8 however requires that both the opening and the edge rim are symmetrical about the container center axis.” Applicants submit that this allegation is incorrect at least from the standpoint of reading a limitation into the claim that is not present. The mere use of the term “circumferentially” does to not imply symmetry as alleged by the Examiner.

Finally, Applicants have amended claim 8 as indicated above. Applicants submit that this amendment overcomes the Examiner’s objection and is supported by the present disclosure.

Ball Fails to Anticipate the Claims

The Office Action rejects claims 1-3, 5, 8-12, 14-15, 17, 20-24 and 26 under 35 U.S.C. § 102(b) as allegedly being anticipated by U.S. Pat. Pub. No. 2002/0050493 to Ball et al. (“Ball”).

Ball Fails to Disclose a Lever Ring as Recited

Independent claim 1, recites, *inter alia*, that “the lever ring has a continuous flat web which radially outwardly merges into an edge rim of the lever ring, a continuous surrounding groove extending between the edge rim and the flat web.” Ball fails to disclose at least these features. Rather, Ball discloses an entire lid or cover. *See, e.g.*, Figure 21, element 174. It is well understood that for a proper anticipation rejection, all claim limitations must be taught or suggested by the prior art and the claim elements must be arranged or combined in the same way as recited in the claim. This baseline standard for anticipation under 35 U.S.C. §102 was reiterated by the Federal Circuit in *Net Moneyin v. Verisign*, 88 USPQ2d 1751, 1759 (Fed. Cir. 2008), holding:

We thus hold that unless a reference discloses within the four corners of the document not only all of the limitations claimed but also all of the limitations arranged or combined in the same way as recited in the claim, it cannot be said to prove prior invention of the thing claimed and, thus, cannot anticipate under 35 U.S.C. § 102.

Furthermore, a “reference must clearly and unequivocally disclose the claimed [invention] or direct those skilled in the art to the [invention] without *any* need for picking, choosing, and combining various disclosures not directly related to each other by the teachings of the cited reference.” *Sanofi-Synthelabo v. Apotex, Inc.*, 89 USPQ2d 1370, 1375 (Fed. Cir. 2008) (emphasis and alterations in original) (quoting *In re Arkley*, 172 USPQ 524 (CCPA 1972)). As such, Applicants respectfully submit that Ball necessarily fails to anticipate the embodiments of the claimed invention.

On page 11 of the Office Action, the Examiner alleges that “Ball discloses a lever ring with a continuous flat web in as much as applicant has shown a lever ring in the Figs. of the application.” First, the Examiner is improperly importing a limitation from the specification into

the claims, rather than giving the claim language its plain and ordinary meaning as required. *See* MPEP § 2111.01(I) and (II). Second, the embodiments of the claimed invention, as recited by claim 1's preamble, recite "[a] lever ring for seaming to a body and for receiving a closure layer affixed with an edge portion by sealing and for bridging an inner space of the lever ring, to close the body in a seam-connected position." This preamble limits the structure of the claim and as such must be treated as a claim limitation. *See* MPEP 2111.02(I).

Next, Ball does not disclose a lever ring. For example, Figure 21 of Ball is not a lever ring. Figure 21 of Ball discloses a lid. "FIG. 21 illustrates a lid 160 embodying the invention and free of countersinking." ¶ [0157]. Ball discloses in Figure 21 that "the substantially planar surface 164 of the lid extends all the way to the raised annular rim 166." This structure is very different from *the lever ring [having] a continuous flat web which radially outwardly merges into an edge rim of the lever ring, a continuous surrounding groove extending between the edge rim and the flat web* recited by claim 1. Applicants point out that claim 1 has been amended as shown above to eliminate the word "comprising" and replace it with "has." This addresses the Examiners argument on page 11, ¶ 42 of the Office Action. Applicants also note that Figure 1 of the instant application shows the left part of a countersink groove N1 and this is only a cut-out from the lever ring. *See, e.g.,* ¶¶ [0017] to [0021] of the published application. As noted, Ball has no countersink groove analogous to the claimed structure. A lever ring typically does not have a full cover or any cover, only a sealing strip (or an inclined flat web), onto which the actual closing layer is sealed. Ball discloses a different structure as noted above.

Additionally, the Examiner takes Figures 12 and 13 of Ball out of context in the Office Action on pages 2-3. The Examiner is failing to consider entirety of Ball's structure and is merely taking the reference piecemeal. Figures 12 and 13 fails to disclose a lid ring and merely

depict part of the total structure of Ball's lid, as shown in Figure 21 for example. Applicants respectfully reiterate, as noted above, that Ball fails to disclose a "lever ring" and discloses a lid.

Applicants note that the two structures serve different function. A lid, as disclosed by Ball, and shown in Figures 22-24, for example, is designed for closing a container. A lever ring, as claimed, does not close a container. Applicants claims are not directed a lid, since such structures, as shown in Ball, are known in the art. Claim 1 recites, *inter alia*, "[a] lever ring for seaming to a body." Such a structure would leave an inner opening in the container that must be sealed either by a lid or a closure layer that is sealed to the surrounding flat web.

Applicants also incorporate by reference the arguments regarding the structure of Ball compared to that of the embodiments of the claimed invention by reference.

In order to maintain an anticipatory rejection under 35 U.S.C. §102, a reference must teach each and every element of the claim. *Verdegaal Bros. v. Union Oil Co. of California*, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) (a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference). "The identical invention must be shown in as complete detail as is contained in the . . . claim." MPEP § 2131 (quoting *Richardson v. Suzuki Motor Co.*, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989)). Therefore, in view of the preceding remarks, the Examiner has failed to present a *prima facie* case of anticipation for at least independent claim 1. Applicants respectfully request the withdrawal of the anticipation rejection of claim 1.

Claim 2 Is Not Anticipated by Ball for At Least the Reasons Given Above for Claim 1

Claim 2, although differing in scope, recites similar recitations to claim 1. Therefore, the remarks made above with respect to claim 1, are equally applicable here. For at least these reasons, the 35 U.S.C. § 102(b) rejection to claim 2 is improper as all of the claimed features are

not taught or disclosed by Ball and Applicants respectfully request the withdrawal of the anticipation rejection of independent claim 2.

The Dependent Claims Are Allowable

Claims 3, 5, 8-12, 14, 15, 17, 20, 22-24, and 26 are dependent on one of claims 1 and 2. As such, these claims include all of the limitations of either independent claim 1 or 2. As such, these claims are allowable for at least the reasons discussed above with respect to independent claims 1 and 2. Additionally, these claims recite additional features which are neither taught nor disclosed by Ball.

Applicants note again that claim 8 has been amended as shown above. Applicants respectfully submit that circumferential structure is already included within the structure of claim 1. Further, Ball fails to provide such structure in Figure 13 considering the view shown there is a sectional elevation view of the lid member of Ball. *See ¶ [0095].*

Applicants respectfully request the withdrawal of the anticipation rejection of claims 3, 5, 8-12, 14, 15, 17, 20, 22-24, and 26.

The Claims Are Not Obvious in view of Ball

The Office Action rejects claims 4, 6-7, 16, and 18-19 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Ball.

Claims 4, 6-7, 16, and 18-19 depend from for one of independent claims 1 and 2. Therefore, these claims are allowable for at least the reasons given above for claims 1 and 2. Specifically, Ball fails to teach or suggest *a lever ring [having] a continuous flat web which radially outwardly merges into an lid rim, a continuous surrounding groove extending between the edge rim and flat the web*, as is recited in independent claims 1 and 2. Further, Ball does not teach or suggest any of the additional recitations of claims 4, 6-7, 16, and 18-19. Accordingly,

claims 4, 6-7, 16, and 18-19 are allowable at least by virtue of their dependency on allowable independent claims 1 and 2. Applicants respectfully request the withdrawal of the obviousness rejection of claims 4, 6-7, 16, and 18-19.

Applicants respectfully submit that all pending rejections have been overcome and the withdrawal thereof is respectfully requested. Therefore, Applicants submit that all claims are in a condition for allowance and indication thereof is respectfully requested.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the present application is in condition for allowance, and an early indication of the same is courteously solicited. The Examiner is respectfully requested to contact the undersigned by telephone at the below listed telephone number, in order to expedite resolution of any issues and to expedite passage of the present application to issue, if any comments, questions, or suggestions arise in connection with the present application.

To the extent necessary, a petition for an extension of time under 37 CFR § 1.136 is hereby made.

Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account No. 50-0206, and please credit any excess fees to the same deposit account.

Respectfully submitted,

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Dated: 2/1/10

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